STATE OF MICHIGAN

COURT OF APPEALS

CITY OF HOLLAND and HOLLAND BOARD OF PUBLIC WORKS,

Plaintiffs-Appellees,

v

DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENT and DIRECTOR OF DEPARTMENT OF NATURAL RESOURCES & ENVIRONMENT,

Defendants,

and

NATURAL RESOURCES DEFENSE COUNCIL, INC., and SIERRA CLUB,

Appellants.

UNPUBLISHED
March 1, 2012

No. 302031
Ottawa Circuit Court
LC No. 10-002031-AA

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent because the trial court should have granted appellants' motion to intervene by right pursuant to MCR 2.209(A)(3).

Appellants adequately met the requirements of MCR 2.209(C) because their filing put plaintiffs on notice of "the claim or defense for which intervention [was] sought." MCR 2.209(C)(2); *SNB Bank & Trust v Kensey*, 145 Mich App 765, 772; 378 NW2d 594 (1985). The majority attempts to factually distinguish *Kensey* from the present case. However, the salient point of *Kensey* was reaffirmed in *SCD Chemical Distribs, Inc v Maintenance Research Laboratory, Inc*, 191 Mich App 43, 45; 477 NW2d 434 (1991), which held that an overly technical reading of MCR 2.209 was not appropriate. Although it is true that appellants did not submit a pleading with their motion, the motion nonetheless put plaintiffs on full notice of the claims and defenses that appellants intended to raise.

Further, the Department of Natural Resources & Environment (DNRE) does not adequately represent appellants' interests. The burden of demonstrating inadequate representation is "minimal." *Karrip v Cannon Twp*, 115 Mich App 726, 731-732; 321 NW2d 690 (1982). Indeed, "inadequacy of representation need not be definitely established." *Vestevich v West Bloomfield Twp*, 245 Mich App 759, 761-762; 651 NW2d 646 (2001). The majority states that the interests of the DNRE and appellants were the same, but this is inaccurate. Though, at the time, both parties sought to uphold the DNRE's denial of a permit for plaintiffs, their interests were not the same. The DNRE represents all Michigan's people and the state itself, and must balance a number of different objectives and concerns, including economic and political considerations. Appellants' focus is much more narrowly restricted to environmental concerns. As stated by the 10th Circuit, the government's "obligation is to represent not only the interest of the intervenor but the public interest generally, and [the government] may not view that interest as coextensive with the intervenor's particular interest." *Utah Assoc of Counties v Clinton*, 255 F3d 1246, 1255-1256 (CA 10, 2001). Many courts, including this one, have found that the government cannot adequately represent the specific interests of advocacy groups such as appellants. *Karrip*, 115 Mich App at 732; *Fund for Animals, Inc v Norton*, 322 F3d 728, 736-737 (CA DC, 2003); *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v Dept of Interior*, 100 F3d 837, 845 (CA 10, 1996) ("We have here the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation."); *In re Sierra Club*, 945 F2d 776, 780-781 (CA 4, 1991) ("Sierra Club does not need to consider the interests of all South Carolina citizens."). Appellants illustrated how their interests diverge from the DNRE: only appellants were willing to defend executive directive 2009-2, and the DNRE's positions were subject to electoral changes.[1] The majority suggests that no authority supports this argument, but in fact these are the same issues that have led courts to conclude that governmental agencies could not adequately represent the narrow interests of advocacy groups. *Karrip*, 115 Mich App at 732; *Fund for Animals*, 322 F3d at 736-737; *Coalition*, 100 F3d at 845; *Sierra Club*, 945 F2d at 780-781. The fact that part of the DNRE's job is to protect Michigan's environment does not mean that it adequately represents appellant's environmental interests. The protection provided by the DNRE is circumscribed by statute, whereas appellants' interests may go much further. The parties' respective interests may overlap, but they are not coextensive and the differences here are sufficient to require a finding of inadequate representation.

I would also find that appellants have standing to intervene in this case. The majority holds that appellants' interests would not be detrimentally affected in a manner different from the citizenry at large. The majority properly quotes the standard from *Lansing Schools Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), that a litigant has standing "if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large." Appellants meet this standard. According to our Supreme Court, "Standing may be proven by showing that the '[appellees'] activities directly

[1] In fact, the DNRE did change its position after the 2010 election.

affected the [appellants'] recreational, aesthetic, or economic interests." *Kallman v Sunseekers Property Owners Ass'n, LLC*, 480 Mich 1099, 1099; 745 NW2d 122 (2008) (quoting *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280; 737 NW2d 447 (2007)).[2] The majority notes that appellants' members may directly experience adverse impacts to their personal health, recreational activities, and aesthetic interests, but fails to recognize that these impacts are precisely the harms that convey standing to appellants. The majority states that the threatened injury is the same for all citizens of Ottawa County, but that is inaccurate. It may be safely presumed that appellants' members will suffer greater injury to their aesthetic interests than other citizens of Ottawa County, some of whom may not perceive air pollution as an aesthetic injury at all. Further, any adverse health impacts will be entirely personal to those suffering them. See *LaFleur v Whitman*, 300 F3d 256, 269-271 (CA 2, 2002) (likely exposure to additional pollutants in the air is "personal and individual" injury sufficient to confer standing). Above all, as noted by this Court in *Karrip*,

> "[S]tanding is not to be denied simply because many people suffer the same injury.
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> To deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody." [*Karrip*, 115 Mich App at 733 (quoting *United States v Students Challenging Regulatory Agency Procedures*, 412 US 669, 687-688; 93 S Ct 2405; 37 L Ed 2d 254 (1973); see also *Federal Election Comm v Akins*, 524 US 11, 24; 118 S Ct 1777; 141 L Ed 2d 10 (1998) ("[W]here a harm is concrete, though widely shared, the Court has found 'injury in fact.'").]

Therefore, I would hold that appellants have standing to intervene. Because appellants have standing and met the requirements for intervention of right under MCR 2.209, I would reverse the trial court's decision denying appellants' motion to intervene.

/s/ Douglas B. Shapiro

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[2] *Nestlé Waters*, which fully supports appellants' claims of standing, is part of a line of cases that were overruled by *Lansing Schools* in part because their standing doctrine was *too restrictive*. 487 Mich at 365-366, 378.